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No. 90-589

FILED
NOV 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE TORO COMPANY,
Petitioner,

v.

WHIPPLE VAN NESS JONES, JR., and
MARYANN CAUSSEAUX JONES, HIS WIFE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents present no persuasive reason for denying Toro's petition. To the contrary, they explicitly agree (Opp. 6) that there is a split of authority among the circuits concerning the issue presented by this case. Yet, Respondents argue that this case does not warrant review. As discussed below, Respondents' arguments are without merit.

1. Although Respondents concede that there is a square conflict among the circuits concerning whether a party waives the inconsistency of a verdict rendered pursuant to Fed. R. Civ. P. 49(a) by its failure to object thereto before the jury is discharged, they suggest that the conflict need not be resolved here because the verdict in this

case was rendered pursuant to Rule 49(b), rather than Rule 49(a). For the first time, Respondents challenge (Opp. 9-10) the propriety of the verdict under Rule 49(a), stating that Rule 49(a) permits the jury to answer only purely factual questions. Respondents assert that the verdict therefore must be deemed to have been rendered under Rule 49(b). This contention is wrong as a matter of both law and fact.

Established case law refutes Respondents' argument. Special interrogatories combining questions of law and fact are clearly proper under Rule 49(a). *See, e.g., Tights, Inc. v. Acme-McCrary Corp.*, 531 F.2d 1047, 1061 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976) ("[i]f an issue presents a mixed question of fact and law, it may be submitted if the jury is instructed as to the legal standard to be applied."). Many courts have held "single ultimate mixed question[s] of law and fact" (Opp. 10) to be appropriate special interrogatories under Rule 49(a). *See Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 519 (11th Cir. 1983) (jury found defendant to have posed a threat of acquiring monopoly power under Section 2 of the Sherman Act); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 887 (2d Cir. 1988) (jury given special interrogatory under Rule 49(a) as to whether defendants had formed, joined or participated in a conspiracy, combination or agreement that was intended to and did constitute an unreasonable restraint of trade); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1544 n.5 (10th Cir. 1987) (jury asked to determine whether any violation of the Age Discrimination in Employment Act by the defendant was willful); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 62, 64 n.8 (5th Cir. 1982) (jury asked separate special interrogatories under Rule 49(a), "one for each of the three theories of liability"); *Griffin v. Matherne*, 471 F.2d 911, 913 n.2 (5th Cir. 1973) (jury given special interrogatories under Rule 49(a) specifically addressing the ultimate issue of negligence). Indeed, special interrogatories

virtually identical to those at issue here were considered appropriate *under Rule 49(a)* in *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975).[1] Moreover, Respondents' assertion (Opp. 9) that the verdict in this case was rendered pursuant to Rule 49(b) ignores the explicit terms of that rule, which require the jury to answer interrogatories *and to render a general verdict.* Fed. R. Civ. P. 49(b); quoted at Pet. 2-3.

In addition, Respondents' argument is irrelevant, because the Eleventh Circuit in fact held *under Rule 49(a)* that the doctrine of waiver applied. *See* Pet. App. 2a ("[t]he jury issued the special verdict in the form of answers to questions presented by the court pursuant to Federal Rule of Civil Procedure 49(a)").[2] Respondents'

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[1] Special interrogatories may combine several elements of a claim into a single question, as long as the question is fair and does not combine two issues disjunctively. *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984). *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2506, 2508 (2d ed. 1971); 5A J. Moore, *Moore's Federal Practice* ¶ 49.03[2] (1990). These matters are within the sound discretion of the district court. *Dreiling v. General Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975).

[2] Respondents' suggestion that the Eleventh Circuit required extensive briefing by the parties in order to appreciate the nature of the verdict at issue underestimates the court of appeals. Moreover, if Respondents actually believed that the court of appeals required further assistance with respect to this issue, they could have attempted to provide it at the time of oral argument. In fact, Respondents expressly stated that there was no need for oral argument (*see* Respondents' C.A. Br. at ii). Finally, Respondents' suggestion (Opp. 10-11) that Toro failed to preserve the waiver issue for review by this Court is utterly without merit. Petitioner raised the issue of inconsistency in its opening brief on appeal to the Eleventh Circuit. *See* Petitioner's C.A. Br. at 12-13. Respondents' contention is further refuted by their own admissions that they addressed the issue (albeit, allegedly "very briefly" (Opp. 10), *see* Respondent's C.A. Br. at 17-19), and that Toro treated the issue fully in its reply (Opp. 10; *see* Petitioner's C.A. Reply Br. at 6-9). Nothing more is required to preserve the issue for this Court's review.

argument amounts to nothing more than an attempt to avoid the indisputable conflict among the circuits concerning the proper practice under Rule 49(a) and should be rejected.[3]

2. Respondents also contend (Opp. 7-9) that this case does not warrant further review because the verdict can be reconciled on the ground that, although the jury found no product defect, it could have found negligence for failure to warn of known dangers connected with the use of the lawnmower. The question before the Court, however, is not whether the verdict in fact can be reconciled, but the more significant question of Petitioner's right to judicial consideration of whether the verdict can be reconciled. Petitioner's argument does not depend on resolution of any factual dispute, but raises the purely legal issue regarding waiver.

In any event, the verdict cannot be reconciled on the ground that the jury based its finding of negligence on an alleged failure to warn. Contrary to Respondents' implication (Opp. 7), the Operator's Manual that accompanied the lawnmower in question cautioned users to fill the fuel tank with gasoline before starting the engine and not to "fill fuel tank while engine is running, *hot* or when machine is in an enclosed area." (Emphasis added). *See* attached Supp. App. 2a; Petitioner's C.A. Record Excerpts; P. Ex. 66, p. 4. Assuming (as Respondents' "warnings" argument does) that the fire was the result

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[3] Respondents argue further (Opp. 11) that there is no basis for the distinction made in most of the circuits between Rule 49(a) and 49(b). The decisions of the majority of courts that have addressed this issue clearly contradict Respondents' contention. *See* Pet. 10-11; *Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84, 93 n.31 (5th Cir. 1966) (noting "significant difference" between Rule 49(a) and 49(b)). Moreover, even if Respondents are correct that there should be no distinction between Rule 49(a) and 49(b), that fact would increase rather than diminish the need for this Court to address the issue, since most courts have adopted the allegedly false distinction.

of Mr. Jones' refueling the motor while the engine was still hot, he obviously did not follow the instructions in the Operator's Manual *not* to refuel while the engine was hot (or running). There thus was no basis on which the jury could have assumed that Mr. Jones would have followed a more specific warning set forth on the mower not to refuel for an hour after the engine had been running, and the inconsistency in the verdict therefore cannot be reconciled on that ground. *See* J. Henderson & A. Twerski, *Products Liability* 387-88 (1987); *American Motors Corp. v. Ellis*, 403 So.2d 459 (Fla. Dist. Ct. App. 1981), *reh'g denied*, 415 So.2d 1359 (Fla. 1982) (no proof of causal relationship between breach of a duty to warn and injury).[4]

Respondents also suggest in passing (Opp. 8 & n.4) that the jury may have believed that different standards obtain for determining the existence of a product defect under a strict liability theory as opposed to a negligence theory. As noted in Toro's petition (at 9 n.5), however, it cannot reasonably be presumed that such an abstruse distinction, even assuming it existed in the law, was derived by a jury of laypersons from the verdict form before them or the trial court's instructions. *Cf. Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) (reversing attempted reconciliation where the language of questions submitted to the jury was "too similar" to hold that the jury distinguished between negligence that caused the accident and negligence that caused the injuries).

Moreover, the Florida courts require as an element of negligence arising from the manufacture and/or distribution of a product proof that a defect was present in

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[4] Respondents also contend (Opp. 7 n.2) that the alleged risk posed by static electricity, which one of their experts testified was the cause of the fire, could have been eliminated by appropriate warnings. Again, however, there was no suggestion in the evidence that Mr. Jones would have abided by any such additional warnings had they been provided.

the product. *Consolidated Aluminum Corp. v. Braun*, 447 So. 2d 391, 392 (Fla. Dist. Ct. App. 1984); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. App. 1981). To support a finding of negligence under Florida law, the jury would have had to find three elements: "(1) that a defect was present in the product; (2) that [the defect] caused the injuries complained of; and (3) that [the defect] existed at the time the retailer or supplier parted possession with the product." *Cassisi v. Maytag Co.*, 396 So.2d at 1143. The jury found in its answer to question 1 (*see* Pet. App. 6a) that Petitioner did not "place the lawnmower on the market with a defect." As a matter of law and common sense, therefore, the verdicts cannot be reconciled.

Significantly, the charge submitted to the jury here (*see* attached Supp. App. 4a; Respondents' C.A. Corrected Record Excerpts at 29-30; C.A. R-3-99-11-12) encompassed every legal definition of "defect." *Compare*, *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 138 Cal. Rptr. 705, 564 P.2d 857, 864-66 (1977) (verdict reconcilable where jury received narrow instruction on defect coupled with broad instruction on negligence; court ruled jury could have found a defect in the product which, although falling outside narrow instruction on defect, would support a finding of negligence). The charge in *Hasson* on which Respondents rely (Opp. 8 & n.4) focused only on a defect existing at the time of manufacture. In this case, by contrast, the charge encompassed all three theories of defect: manufacture, design, and expectations of the consumer. *See* Supp. App. 4a. There was thus no possibility that in finding "no defect" under strict liability, the jury could have been relying on an alternative definition of "defect."

3. Finally, Respondents argue (Opp. 12) that this case is unworthy of the Court's review because the Eleventh Circuit's opinion is unpublished. That opinion, however, mechanically applies the Eleventh Circuit's published decisions in *Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516,

1521 n.4 (11th Cir. 1989), and *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983) (Pet. App. 2a).[5] If such a procedure may be employed by the court of appeals so as to insulate from review its harsh waiver rule, the error and inequity of the rule will remain uncorrected.[6]

For the foregoing reasons and those stated in Toro's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1990

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[5] The Eleventh Circuit placed this case on its summary calendar and declined even to hear argument on Petitioner's objection to the inconsistency of the verdict.

[6] Respondents assert (Opp. 13) that this case presents no constitutional issue. As noted above and in Toro's petition (Pet. 6-8), several courts have discussed the constitutional dimensions of this issue under Rule 49(a) and its importance in preserving the right to a jury trial.

APPENDIX

APPENDIX

OPERATOR'S MANUAL

BEFORE OPERATING

Above 32°F (0°C)—Use SAE 10W-30 engine oil. SAE 10W-40 engine oil or type A automatic transmission fluid may be used as a substitute.

Below 32°F (0°C)—Use type A automatic transmission fluid. SAE 5W-20 engine oil may be used as a substitute.

IMPORTANT: DO NOT intermix automatic transmission fluid with engine oil. DO NOT USE DEXTRON II ATF.

1. Position machine on a level surface, raise the cutting unit and stop the engine.

2. Remove dipstick cap (Fig. 10) from filler neck and wipe it with a clean rag. Screw dipstick cap finger-tight onto filler neck; then remove it and check level of fluid. If level is not within ½ inch (13 mm) from the groove in the dipstick (Fig. 10), add SAE 10W-30 engine oil, or, if used, automatic transmission fluid to raise level to groove mark. Do not overfill.

[Figure 10 Omitted in Printing]

IMPORTANT: When adding transmission fluid to the hydraulic system, use a funnel with a fine wire screen—200 mesh or finer—and make sure funnel and transmission fluid are immaculately clean. This procedure prevents accidental contamination of the hydraulic system.

3. Thread dipstick filler cap finger-tight onto filler neck. It is not necessary to tighten cap with a wrench.

FILL FUEL TANK WITH GASOLINE

THE TORO COMPANY STRONGLY RECOMMENDS THE USE OF CLEAN, FRESH UNLEADED REGULAR GASOLINE IN TORO GASOLINE POWERED

PRODUCTS. UNLEADED GASOLINE BURNS CLEANER, EXTENDS ENGINE LIFE, AND PROMOTES GOOD STARTING BY REDUCING THE BUILD-UP OF COMBUSTION CHAMBER DEPOSITS. LEADED GASOLINE CAN BE USED IF UNLEADED IS NOT AVAILABLE.

NOTE: NEVER USE METHANOL, GASOLINE CONTAINING METHANOL, GASOHOL CONTAINING MORE THAN 10% ETHANOL, GASOLINE ADDITIVES, PREMIUM GASOLINE, OR WHITE GAS BECAUSE ENGINE FUEL SYSTEM DAMAGE COULD RESULT.

[EMBLEM] **DANGER**

Because gasoline is flammable, caution must be used when storing or handling it. Do not fill fuel tank while engine is running, hot or when machine is in an enclosed area. Vapors may build up and be ignited by a spark or flame source many feet away. DO NOT SMOKE while filing [sic] the fuel tank to prevent the possibility of an explosion. Always fill fuel tank outside and wipe up any spilled gasoline before starting engine. Use a funnel or spout to prevent spilling gasoline before starting engine and fill tank to about 1 inch (25 mm) below the filler neck. Store gasoline in a clean safety-approved container and keep the cap in place on the container. Keep gasoline in a cool, well-ventilated place; never in an enclosed area such as a hot storage shed. To assure volatility, do not buy more than a 30 day supply of gasoline. Gasoline is a fuel for internal combustion engines; therefore, do not use it for any other purpose. Since many children like the smell of gas, keep it out of their reach because the fumes are explosive and dangerous to inhale.

1. Tip seat forward and prop it so it cannot fall accidentally. Using a clean rag, clean area around fuel tank cap (Fig. 11).

2. Remove cap from the fuel tank and fill the 6 gallon (22.7 L) tank to within 1 inch (25 mm) from the top with gasoline. Install fuel tank cap tightly.

3. Wipe up gasoline that may have spilled to prevent a fire hazard. Remove support from under seat and allow seat to pivot back to its normal position.

[Figure 11 Omitted in Printing]

WRITTEN JURY INSTRUCTIONS

The issues for your determination on the strict liability claim of Van and Maryann Jones against The Toro Company are whether the lawnmower manufactured by The Toro Company was defective when it left the possession of The Toro Company and, if so, whether such defect was a legal cause of injury or damage sustained by Van Jones.

A product is defective:

1. If it is manufactured in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition; or

2. If by reason of its design the product is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if a) the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or b) the risk of danger in the design outweighs the benefits.

In determining whether a product is defective, you may consider whether the product was fit for the purpose for which it was intended and whether the product in question conformed to the generally recognized and prevailing standards at the time of its manufacture and sale.